

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JAMES K. WARDELL,

Plaintiff,

vs.

PAUL R. COCHRAN and JIM  
BENEDITTI,

Defendants.

3:06-CV-668-LRH (RAM)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendants' Motion to Dismiss. (Doc. #10.) Plaintiff has opposed (Doc. #12), and Defendants have replied (Doc. #13). After a thorough review, the court recommends that Defendants' motion should be granted.

**I. BACKGROUND**

At the time of the events in his complaint, Plaintiff was in custody of the Northern Nevada Department of Corrections at the Nevada Correctional Center (NNCC). Plaintiff alleges that on eight different occasions in November 2006, Correctional Officer Cochran forced him to submit to various sexual acts to receive his meals. (Doc. #6, at 4-6.) Plaintiff also contends that Officer Cochran threatened him with retaliation if Plaintiff filed a complaint or refused to comply with his demands. (*Id.* at 6.) Defendant Benedetti is named as the supervisor responsible for Officer Cochran. Based on these allegations, Plaintiff states a claim for violation

1 of the Fourteenth and Eighth Amendments as well as an unspecified claim for sexual  
2 harassment. Defendants move to dismiss because Plaintiff has failed to exhaust his  
3 administrative remedies before filing suit in federal court. (Doc. #10 at 2.)

## 4 **II. LEGAL STANDARD**

5 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought  
6 with respect to prison conditions under section 1983 of this title, or any other Federal law, by  
7 a prisoner confined in any jail, prison, or other correctional facility until such administrative  
8 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The Supreme Court recently  
9 clarified that exhaustion cannot be satisfied by filing an untimely or otherwise procedurally  
10 infirm grievance, but rather, the PLRA requires “proper exhaustion.” *Woodford v. Ngo*, 548  
11 U.S. 81, 89 (2006). “Proper exhaustion” refers to “using all steps the agency holds out, and  
12 doing so *properly* (so that the agency addresses the issues on the merits).” *Id.* (quoting *Pozo*  
13 *v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original). “Proper  
14 exhaustion demands compliance with an agency’s deadlines and other critical procedural rules  
15 because no adjudicative system can function effectively without imposing some orderly  
16 structure on the course of its proceedings.” *Id.* at 90-91.

17 This court has interpreted Justice Alito’s majority opinion in *Woodford* as setting forth  
18 two tests for “proper exhaustion”: 1) the “merits test”, which is satisfied when a plaintiff’s  
19 grievance is fully addressed on the merits by the administrative agency and appealed through  
20 all the agency’s levels, and 2) the “compliance test”, which is satisfied when a plaintiff complies  
21 with all critical procedural rules and deadlines. *Jones v. Stewart*, 457 F. Supp. 2d 1131, 1134  
22 (D. Nev 2006). “A finding that a plaintiff has met either test is sufficient for a finding of ‘proper  
23 exhaustion’. Defendant must show that Plaintiff failed to meet both the merits and compliance  
24 tests to succeed in a motion to dismiss for failure to exhaust administrative remedies.” *Id.*

25 The failure to exhaust administrative remedies is treated as a matter in abatement and  
26 is properly raised in an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108,  
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1 1119 (9th Cir.2003), *cert. denied*, 540 U.S. 810 (2003). Failure to exhaust administrative  
2 remedies is an affirmative defense, and Defendants bear the burden of raising and proving  
3 failure to exhaust. *Id.* A court, in deciding a motion to dismiss based on exhaustion, may look  
4 beyond the pleadings and decide disputed issues of fact without converting the motion into one  
5 for summary judgment. *Id.* (citing *Ritza v. Int'l Longshoremen's & Warehousemen's Union*,  
6 837 F.2d 365, 368 (9th Cir. 1988) (per curiam)). If a court concludes that the prisoner bringing  
7 a suit has failed to exhaust nonjudicial remedies, “the proper remedy is dismissal of the claim  
8 without prejudice.” *Id.* at 1120.

9 For prisoners within the NDOC system, exhaustion of administrative remedies requires  
10 complying with the Inmate Grievance Procedure set forth in NDOC Administrative Regulation  
11 740 (AR 740). The administrative process consists of: 1) an Informal Level grievance that is  
12 reviewed and responded to by an inmate caseworker; 2) a First Level formal written grievance  
13 appealing the informal grievance decision to the warden at the institution where the inmate is  
14 housed; and 3) a Second Level grievance appealing the First Level grievance decision, which  
15 is decided by the Assistant Director of Operations. (Doc. #10, Ex. A, at 11 [AR 740.02 § 1.1.1.1  
16 (effective 1/5/04)].) If an inmate disagrees with the response to any grievance, he may appeal  
17 the grievance to the next level within the prescribed deadlines. (*Id.* at 12 [AR 740.02 § 1.1.1.4].)

### 18 **III. DISCUSSION**

19 Defendants contend that Plaintiff’s complaint should be dismissed because he has failed  
20 to exhaust his administrative remedies. Defendants provide affidavits from associate wardens  
21 at both institutions where Plaintiff has been housed<sup>1</sup> indicating that there is no record that  
22 these grievances were ever filed. (Doc. #10, Ex. 1, at 1-2.) In his opposition, Plaintiff alleges  
23 that he filed grievances on November 20th, 2006, December 12th, 2006, and February 10th,  
24 2007 but never received a response. (Doc. #12 at 8.) Plaintiff did not include any copies of  
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27 <sup>1</sup> Plaintiff transferred from NNCC to Nevada State Prison on December 13, 2006. (Doc. #10 at 3.)  
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1 these grievance with his complaint<sup>2</sup>, but does include them in his opposition. (Doc. #12, Exs.  
2 A, B, and C.)

3 Defendants argue that these forms are fraudulent. (Doc. #10 at 13.) The affidavit from  
4 the associate warden at NNCC indicates that he would have signed the grievance forms as they  
5 were received and that the signature appearing on the forms supplied by Plaintiff are not his.  
6 (Doc. #13, Ex. #1, at 2, ¶¶ 12-14.) This official also indicates that had the grievances been  
7 received by the prison, they would show a date, log number, and staff member response. *Id.*  
8 The grievances submitted by Plaintiff are blank except for the signature boxes.

9 In light of the clear and convincing evidence that Plaintiff has not filed a complaint  
10 through the Inmate Grievance Procedure, his claims should be dismissed.<sup>3</sup> Neither the  
11 compliance nor the merits tests for administrative exhaustion are met in this case, as the  
12 grievance has not been properly presented to prison officials. *See Jones*, 457 F.Supp. at 1134.  
13 As such, the proper remedy should be dismissal without prejudice. *O'Guinn v. Lovelock*  
14 *Correctional Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007).

15 Plaintiff has filed an additional pleading responding to Defendants' reply. (Doc. #18.)  
16 This is a fugitive pleading not authorized by Federal Rule of Civil Procedure 7 and should not  
17 be considered by the court. Therefore, Defendants' motion to strike should be granted (Doc.  
18 #16) and their motion for enlargement of time to respond (Doc. #17) should be denied as moot.

### 19 III. RECOMMENDATION

20 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order  
21 **GRANTING** Plaintiff's Motion to Dismiss (Doc. #10) without prejudice.

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25 <sup>2</sup> Plaintiff indicates that he filed an informal grievance but received no response. (Doc. #6 at 8-9). He  
26 does not refer to a First or Second Level grievance in the pleading.

27 <sup>3</sup> The court should also deny Plaintiff's request to find Defendants in contempt, as this is without legal  
28 foundation. (Doc. #12 at 8.)

The parties should be aware of the following:

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. Civ. P., should not be filed until entry of the District Court's judgment.

DATED: February 10, 2009.

*[Handwritten signature]*

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